Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the California Public Utilities	)	NSD File No. L-99-36
Commission for Waiver to Implement a	)	CC Docket No. 96-98
Technology-Specific or Service-Specific	)	
Area Code	)	
	)	

OPPOSITION OF SPRINT PCS

Sprint Spectrum L.P., d/b/a Sprint PCS ("Sprint PCS"), opposes the petition of the California Public Utilities Commission ("CPUC") requesting a waiver of Rule 52.19(c) so that it may implement a wireless-only or another type of technology/service-specific overlay area code.[1] The Commission must deny this petition (and similar petitions filed by other states) for any of the reasons set forth below.

I. The Commission Does Not Have the Authority to Permit a State to Require Carriers to Violate the Communications Act

Twice in recent years the Commission has ruled that the implementation of a wireless-only overlay would confer "significant competitive advantages on the wireline companies,"[2] and as such, would violate both Sections 201 and 202 of the Communications Act:

> [T]he *Ameritech Order* declared that Ameritech's proposed wireless-only area code overlay would be unreasonably discriminatory and anti-competitive in violation of the Commission's guidelines and the Communications Act of

[1] *See Public Notice,* "Common Carrier Bureau Seeks Comment on the Petition of the California Public Utilities Commission for a Waiver to Implement a Technology-Specific or Service-Specific Area Code," NSD File No. L-99-36, DA 99-929 (May 14, 1999).

[2] *Ameritech 708 Relief Plan Order,* 10 FCC Rcd 4596, 4608 ¶ 27 (1997)("*Ameritech Order*").

> 1934. * * * [W]e conclude that any overlay that would segregate only particular types of telecommunications services or particular types of telecommunications technologies in discrete area codes would be unreasonably discriminatory and would unduly inhibit competition. We . . . explicitly prohibit[] all service-specific or technology-specific area code overlays . . . .[3]

Indeed, only two weeks ago the Commission reiterated that "[w]e continue to believe the service-specific or technology-specific overlays raise serious competitive issues."[4]

The CPUC now seeks authority to implement the very kind of area code that the Commission has ruled would violate the Communications Act and would have an anti-competitive impact in the market. Sprint PCS submits that the Commission may not delegate to a state authority that would require carriers to contravene the Communications Act. This reason alone is grounds to dismiss the CPUC petition.

II. The CPUC Has Not Met Its Heavy Burden of Demonstrating Its Entitlement to a Waiver or that Grant of a Waiver Would Achieve the Desired Result

A waiver applicant, the Commission has noted, "faces a high hurdle even at the starting gate":[5]

> A heavy burden traditionally has been placed upon one seeking a waiver to demonstrate that his arguments are substantially different from those which have been carefully considered at the Rule Making proceedings.[6]

---

[3] *Second Local Competition Order,* 11 FCC Rcd 19392, 19513 ¶ 274, 19518 ¶ 285 (1996). *See also id.* at 19527 ¶ 304 ("We conclude that the Texas Commission's wireless-only overlay violates our *Ameritech Order* on its face."); and note 2 *supra.*

[4] *Numbering Resource Optimization NPRM,* CC Docket No. 99-200, FCC 99-122, at 110 ¶ 257 (June 2, 1999).

[5] *See U S WEST Communications,* 7 FCC Rcd 4043, 4044 ¶ 6 (1992), *quoting WAIT Radio* v. *FCC,* 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied,* 409 U.S. 1027 (1972).

[6] *Riverphone,* 3 FCC Rcd 4690, 4692 ¶ 13 (1988). The same stringent standard applies to waiver petitions submitted by states. *See, e.g., State of New Hampshire Waiver Denial Order,* 11 FCC Rcd 5258 (1996); *Texas Area Code Relief Plan Waiver Order,* 13 FCC Rcd 21798 (1998).

A waiver *may* be appropriate *if* "[1] special circumstances warrant a deviation from the general rule *and* [2] such deviation will serve the public interest."[7] In addition, the applicant "must clearly demonstrate that the general rule is not in the public interest when applied to its particular case and that granting the waiver will not undermine the public policy served by the rule."[8] Of course, "[t]he very essence of waiver is the assumed validity of the general rule."[9]

The CPUC has not identified any special circumstances justifying a deviation from the prohibition on wireless-only overlays. The sole justification for its request is the assertion that there exists a "critical numbering situation in California."[10] There is, indeed, a numbering crisis in California. However, there exists a similar crisis in other states — including in Illinois and Texas — yet the Commission declined to grant those states the authority to implement discriminatory, wireless-only overlay area codes.[11]

Even if it had demonstrated some unique circumstances, the CPUC certainly has not demonstrated that its requested waiver will serve the public interest — much less "better serve the public interest."[12] The CPUC does not challenge the Commission's past findings that wireless overlays would confer "significant competitive advantages" on landline

---

[7] *Texas Area Code Relief Plan Waiver Order,* 13 FCC Rcd at 21801 ¶ 6 (emphasis added), *citing Northeast Cellular* v. *FCC,* 897 F.2d 1164, 1166 (D.C. Cir. 1990), and *WAIT Radio,* 418 F.2d at 1157.

[8] *U S WEST,* 12 FCC Rcd 8343, 8346 ¶ 10 (1997); *Bell Atlantic,* 12 FCC Rcd 10196, 10198 ¶ 5 (1996).

[9] *WAIT Radio,* 418 F.2d at 1158. *See also Southwestern Bell,* 12 FCC Rcd 10231, 10239 ¶ 13 (1997); *U S WEST Communications,* 7 FCC Rcd 4043, 4044 ¶ 6 (1992). Courts have recognized that the Commission "has broad discretion to deny waivers." *A/B Financial* v. *FCC,* 1995 U.S. App. LEXIS 37378, at 5 (D.C. Cir. 1995). Courts will reverse a waiver denial only if the Commission's reasons are "so insubstantial as to render that denial an abuse of discretion." *Melcher* v. *FCC,* 134 F.3d 1143, 1163 (D.C. Cir. 1998).

[10] CPUC Overlay Petition at 2. *See also id.* at 7.

[11] *See* notes 2 and 3 *supra.* The fact that California has more area codes than other states does not present a unique circumstance — because California is more populous than other states.

[12] *Northeast Cellular,* 987 F.2d at 1166.

carriers and would impose a "disproportionate burden" on wireless carriers.[13] Instead, it asserts that the discriminatory impact of a wireless-only overlay may be outweighed by the *possibility* that such an overlay would permit the CPUC to "gain control of the ongoing number crisis."[14]

This entirely unsupported argument is not credible and, in fact, is undercut by the few facts the CPUC includes in its petition. According to the CPUC, a total of 1,832 NXX codes were assigned in California during the first 11 months of 1998.[15] Wireless carriers received 520 of these codes — or only 26% of the total codes assigned during the sample period.[16] It is not apparent how the CPUC expects to "gain control of the ongoing crisis" by imposing a discriminatory regime on an industry segment that is receiving only one-fourth of all new NXX codes.[17] This is particularly the case when, as demonstrated below, wireless carriers use their codes far more efficiently than other industry segments.

Like California, Texas once argued that the Commission should authorize it to implement a wireless-only overlay as a means to extend the life of existing area codes. The Commission denied this request because Texas provided "no compelling reason for isolating a particularly technology in the new NPA":

---

[13] *Ameritech Order,* 10 FCC Rcd 4608 ¶¶ 27 and 28.

[14] CPUC Overlay Petition at 1.

[15] *Id.* at 5.

[16] *Ibid.*

[17] If anything, it is grant of the requested relief that could aggravate the crisis in California because the CPUC, already having difficulty implementing relief timely, would then face the prospect of implementing yet additional relief plans (landline-only and wireless-only).

> What extends the life span of a relief plan . . . is not so much the wireless overlay as the introduction of a new NPA with its 792 additional NXXs.[18]

California has presented an even less compelling case compared to Texas. Accordingly, the Commission based on its own precedent should deny the California petition as well.

III. Grant of a Waiver Would Eviscerate the Rule Prohibition and Prejudge the Outcome of the Pending Rulemaking

It is axiomatic that the Commission "must not eviscerate a rule by a waiver."[19] The Commission has further held that grant of a waiver is inappropriate when the request involves the same subject matter as a pending rulemaking, because a waiver grant could prejudge the outcome of the rulemaking.[20] The Commission has been especially reluctant to grant a waiver when to do so would "invite numerous other waiver requests which, if granted, would effectively circumvent the Commission's rulemaking function."[21]

This is precisely the situation here. The Commission, in response to the CPUC petition and similar petitions filed by other states, recently commenced a rulemaking "to reex-

---

[18] *Second Local Competition Order,* 11 FCC Rcd at 19528 ¶ 306.

[19] *See Riverphone,* 3 FCC Rcd 4690, 4692 ¶ 12 (1988). *See generally WAIT Radio,* 418 F.2d at 1159 (Waiver procedure "emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.").

[20] *See, e.g., Granite Broadcasting,* 13 FCC Rcd 13035, 13038 ¶ 12 (19)("We believe that these are matters more properly debated in the pending rulemaking proceeding and that if they serve as a basis for waiver, they would prejudge that proceeding."); *Cost Support Material Waiver Denial Order,* 8 FCC Rcd 2306 ¶ 5 (1993)("The re-allocation of GSF costs requested by US West is the subject of a pending rulemaking. US West makes no showing that advanced implementation of the proposed rule in its service area (or generally) is in the public interest, or that any unique circumstances exist that would support grant of a waiver."); *RKO General,* 3 FCC Rcd 5262, 5263 ¶ 7 (1988)("The Commission does not routinely waive rules merely because they might be modified in the future as the result of a pending rulemaking. Indeed, the Commission recently refused to grant a similar request for a waiver . . . pending the outcome of the pending rulemaking, explaining that to do so might improperly prejudge the outcome of the rulemaking.").

[21] *Verilink Corp.,* 10 FCC Rcd 8914, 8916 ¶ 6 (1995).

amine our policies with respect to service-specific and technology-specific overlays, and to consider whether we should modify or lift the restriction on these area code relief methods."[22] If the Commission were to grant the CPUC request, it would be reasonable to expect numerous other states to file "me too" waiver requests; indeed, Massachusetts has already filed a similar waiver request.[23] And if the Commission were to grant the CPUC request, on what basis could it deny similar requests filed by Massachusetts and other states?[24] In effect, then, grant of the CPUC request would eviscerate the rule before the rulemaking is completed, thereby prejudging the outcome of the rulemaking. Sprint PCS submits that "the proper procedural forum to deal with [the subject of service/technology-specific overlays] is a rulemaking proceeding, and not the waiver process."[25] Put another way, grant of a waiver to the CPUC would have the practical effect of eviscerating the prohibition on wireless-only overlays.

---

[22] *Numbering Resource Optimization NPRM,* CC Docket No. 99-200, FCC 99-122, at 110 ¶ 257 (June 2, 1999).

[23] *See Public Notice,* "Common Carrier Bureau Seeks Comment on Massachusetts Petition for Waiver to Implement a Technology-Specific Overlay in the 508, 617, 781, and 978 Area Codes," DA 99-460 (March 4, 1999).

[24] Importantly, the Commission may grant a waiver only if it is based on "articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application." *WirelessCo,* 10 FCC Rcd 11111, 11114 ¶ 17 (1995). *See also Northeast Cellular,* 987 F.2d at 1166 ("The agency must . . . articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.").

[25] *Transport Rate Structure and Pricing,* 7 FCC Rcd 7006, 7072 ¶ 155 (1992). *See also Non-Dominant Reseller Waiver Denial Order,* 11 FCC Rcd 3014 ¶ 4 (1996)("The relief requested, if granted, would significantly change the scope of the application of our current unbundling rule. Such a significant modification is more appropriately considered through a rulemaking than through a petition for waiver. . . . We believe that this rulemaking would be the appropriate forum in which to consider whether our CPE unbundling rule continues to be necessary, and, if so, to which carriers it properly applies."); *GVNW Waiver Denial Order,* 11 FCC Rcd 13915, 13920 ¶ 13 (1996)(Waiver would "in effect modify[] the rule for the entire class of companies. Such changes may only be instituted through a rulemaking proceeding."); *Loral/Qualcomm Partnership,* 10 FCC Rcd 2332, 2336 ¶ 21 (1995)("The rulemaking process, not the waiver procedure, is the more appropriate vehicle for changing a technical requirement that will affect all licensees.").

IV. The CPUC's Argument Concerning CMRS Number Pooling Is a Red Herring — and Is Contrary to All Known Facts

The CPUC asserts that it confronts a "dilemma" because the Commission is expected to order thousands block pooling but that CMRS providers cannot participate in such pooling (because they cannot support local number portability).[26] The CPUC therefore asserts that it "seems reasonable" to require carriers that cannot participate in number pooling to be placed in "a separate NPA."[27] Apparently, the CPUC believes that the public interest would be harmed if CMRS providers do not participate in number pooling under the further assumption that CMRS providers are not currently using their numbers efficiently.

Sprint PCS agrees that allocating numbers in blocks of 1,000 makes sense for those carriers choosing to use numbers on a landline rate center model — especially when the landline industry is expected to realize annual growth rates of less than five percent over the near future.[28] However, allocating numbers in blocks of 1,000 makes no sense for the CMRS industry, because CMRS providers do not utilize the landline rate center paradigm. Indeed, NANPA recently demonstrated that nationwide CMRS service is provided using numbers assigned to only 14% of all landline rate centers.[29] Assigning numbers in blocks of 1,000 makes even less sense for an industry that is expected to enjoy double-digit growth in the near

---

[26] CPUC Overlay Petition at 6-7.

[27] *Ibid.*

[28] *See* NANP Exhaust Study at 3-8 (April 22, 1999).

[29] *See id.* at 3-4 and 3-4; Table 3-1.

future — and when some new entrants like Sprint PCS are growing much faster than the industry average.[30]

There is no support whatever for the CPUC's undocumented assumption that CMRS providers (as a whole) do not currently use their numbering resources efficiently. In fact, the Commission recently found, based on number utilization data that had been submitted to it, that CMRS providers "are using a relatively high percentage of their allocated numbering resources."[31] Moreover, NANPA recently documented that CMRS providers use their numbers far more efficiently than other industry segments, with CMRS providers averaging a fill rate of 43%, while incumbent and competitive LECs having an average fill rate of 36% and 6% respectively.[32]

Sprint PCS is not suggesting that CMRS providers should be immune from number conservation measures. However, an effective conservation measure for one industry segment is not necessarily an effective conservation measure for other industry segments. Thousands block pooling will be an effective conservation measure for the landline industry; at least in the foreseeable future, such pooling will not be an effective conservation measure for the mobile industry.

---

[30] *See id.* at 3-9. It bears remembering that it takes a minimum of 66 days before newly assigned numbers can be activated and used. Sprint PCS has numerous markets where it has exhausted a block of 1,000 numbers in two weeks — or less.

[31] *CMRS LNP Forbearance Order,* WT Docket No. 98-229, FCC 99-19, at ¶ 45 (Feb. 8, 1999). The Commission further noted correctly that certain CMRS providers like Sprint PCS "support the Commission's efforts to slow the pace of area code exhaust, and increase the efficiency with which numbering resources are allocated and utilized, in large part because they have been hampered in their ability to obtain access to sufficient numbering resources to meet the demand for their services in area codes where jeopardy has been declared." *Id.*

[32] *See* NANP, Number Utilization Forecasts and Trends, at 12 (Feb. 4, 1999).

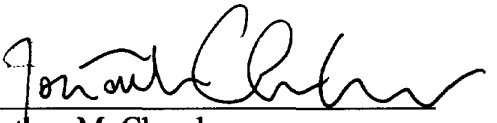
The CMRS industry has documented that as a whole, it uses its assigned numbering resources efficiently. It is now time to place the burden on proponents of new conservation measures such as pooling to document how application of such measures would improve the utilization with which CMRS providers use their numbering resources. To date, neither the CPUC nor any other proponent of new regulation of CMRS has even attempted to make such a showing.

V. Conclusion

For all the foregoing reasons, Sprint PCS respectfully requests that the Commission deny the CPUC's petition seeking authority to implement a wireless-only overlay and similar petitions that other states have filed or may file. The subject is best addressed in the pending rulemaking proceeding.

Respectfully submitted

SPRINT SPECTRUM, L.P.,
d/b/a SPRINT PCS

By: 

Jonathan M. Chambers
Vice President, Sprint PCS
1801 K Street, N.W., Suite M112
Washington, D.C. 20006
(202) 835-3617

Joseph Assenzo
General Attorney, Sprint PCS
4900 Main, 12th Floor
Kansas City, MO 64112
816-559-1000

June 14, 1999

Certificate of Service

I, Tony Traini, hereby certify that on June 14, 1999, I caused to be served, by first-class mail, postage prepaid (or by hand where noted) copies of this opposition.

*International Transcription Services
1231 20th Street, N.W.
Washington, D.C. 20036

Helen M. Mickiewicz
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

*Yog R. Varma
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
The Portals, 445 12th Street, S.W.
Washington, D.C. 20554

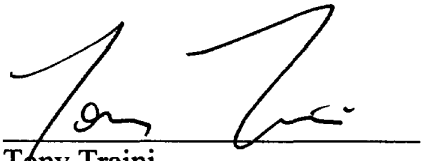
*Al McCloud
Network Services Division
Common Carrier Bureau
Federal Communications Commission
Portals II, 445 12th Street, S.W.
Washington, D.C. 20554

Thomas Sugrue
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Portals, 445 12th Street, S.W.
Washington, D.C. 20554

Jared Carlson
Network Services Division
Common Carrier Bureau
Federal Communications Commission
Portals II, 445 12th Street, S.W.
Washington, D.C. 20554

David Furth
Wireless Telecommunications Bureau
Federal Communications Commission
Portals II, 445 12th Street, S.W.
Washington, D.C. 20554

Joel Tabubenblatt
Wireless Telecommunications Bureau
Federal Communications Commission
Portals II, 445 12th Street, S.W.
Washington, D.C. 20554



Tony Traini